

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1391

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

-vs-

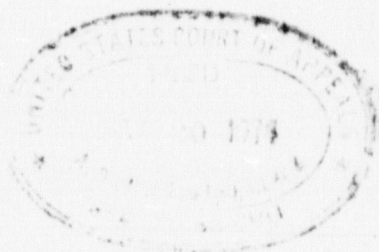
Docket #74-1391

THOMAS BELL,

Defendant-Appellant

APPENDIX

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CR-1973-328

by force and violence and by intimidation, did attempt to take from the person and presence of an employee, money belonging to an FDIC-Insured bank, in violation of Section 2113(a), Title 18, U.S.C.

J. S. 2 mailed

DATE	PROCEEDINGS
1973	
Oct. 16	Filed Indictment
Oct. 16	J.S. 2 made
Oct. 15	Filed Cy. 5 of CJA-20- Order appointing David M. Brown, Esq., as counsel for the Deft., Maxwell, Mag.
Oct. 19	Filed Magistrate's transcript with complaint, and affidavit, and temporary commitment
Oct. 24	Filed Cy. 5 of CJA-21 - Authorization for psychiatric examination of Deft. by Dr. Michael Lynch--CURTIN, J.; cy. to the Adm. office Orig. ret. by counsel for Dr. Lynch.
Oct. 18	Deft. being duly arraigned, enters a plea of not guilty to the Indictment. Adj. to 11/1/1973 for motions.
Oct. 30	Filed Deft's motion for Discovery and inspection, ret. 11/1/1973
Nov. 1	Return date for motions. Deft. has filed motions. Adj. to 11/15/1973 for Govt's answer
Nov. 8	Filed Deft's notice of motion and affidavit for an order declaring any and all identifications of the deft. herein to be unduly suggestive, illegal, and etc., and prohibiting the U.S. Atty., etc., from using such evidence of identification upon a trial of this action, etc., ret. 11/15/1973
Nov. 15	Filed Govt's answer to the pre-trial motions of Thomas Bell

U. S. GOVERNMENT PRINTING OFFICE: 1969

DATE	PROCEEDINGS
1973	
Nov. 15	Motion for discovery, et. Motion for suppression hearing. Adj. until tomorrow at 2:00 P.M. for hearing.
Nov. 22	Identification hearing. Hearing adj. to 12/3/1973---2:00P.M.
Nov. 29	Filed Govt's motion to move action for trial
Dec. 3	Continuation of suppression hearing from Nov. 23, 1973 --Evidence Cl Motion of the Deft. to suppress is denied. Motion by the Deft. to dismiss the Indictment is denied. Adj. to 12/13/1973 for status report.
Dec. 13	Status Report. Waiting for report from Dr. Lynch. Adj. 12/20/1973
Dec. 20	Status Report - Court is advised that Govt. has received Dr. Lynch's report. Govt. requests that it select Dr. to also examine the Deft. Court to make order after examining Dr. Lynch's report.
1974	
Jan. 10	Filed Order that the Govt. having moved for an examination of Deft. Bell by another psychiatrist to determine pre-sent. competency mental capacity at the time of the alleged crime, after consid ing the argument of counsel and the reports of Dr. Lynch, the Court orders that an examination of the deft. shall be held as soon as possible by a qualified psychiatrist in behalf of the govt. to determine present competency, pur. to 18 U.S.C. Sect. 4244. The examination for the Govt. shall not be made to determine the mental capacity of Thomas Bell at the time of the crime charged. The report of the govt. psychiatrist shall be made available to defense counsel and the Court and a meeting shall be held not later than Jan. 17, 1974 to determine further proceedings in this matter--CURTIN, J.
Jan. 24	Govt. has filed motion with court this morning. Ruling to be made shortly by Court and then case will be ready for trial.
Jan. 31	Filed Decision and Order denying Govt.'s motion for an examination o by a psychiatrist in behalf of the govt., prior to trial, to examine the deft. regarding his mental capacity at the time o the crime charged; However, if the deft. raises the issue by testimony at the trial, the court will order the examination the deft. at that time, under the conditions set forth in the Baird and Weiser cases. Trial is set for 2/11/1974--CURTIN, J
Feb. 6	Filed Cy. 5 of CJA-21 authorization for transcript; Cy. to the Adm. office.
Feb. 7	Filed two subpoenas (D.T.) Meyer Memorial Hospital, Buffalo State Hos served 2/6/1974
Feb. 8	Filed subpoena (D.T.) Erie County Holding Center, served 2/7/1974
Feb. 11	Filed Ct. Steno's transcript of proceedings of 11/22/1973 and 12/3/1973 motion to suppress.
Feb. 11	Filed Cy. 2 - Voucher for transcript in the amt. of \$36.00; Orig. to the adm. office for payment.
Feb. 11	Govt. moves case ready for trial, before Judge Curtin, and Jury at Buffalo, N.Y.----
Feb. 12	Trial continues from yesterday with the same appearances and jury--- Deft. moves for the dismissal of the indictment on grounds Govt. has failed to prove the guilt of the Deft. beyond a reasonable doubt. Motion denied. Trial is adj. 2/19/74--
Feb. 13	Filed Ct. Steno's transcript of excerpt of proceedings of trial before

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-VS-

THOMAS BELL

MARCH 1973 Session ~~xxxx~~

IMPANELED July 9, 1973

No.

1973 328

Vio. T. 18, U.S.C.
§2113(a)

The Grand Jury charges:

On or about the 11th day of October, 1973, in the City of Buffalo, in the Western District of New York, THOMAS BELL, by force and violence and by intimidation, did attempt to take from the person and presence of Geraldine Schmid money, belonging to and in the care, custody, control, management and possession of the Marine Midland Bank-Western, Main and Chippewa Office, the deposits of which were then insured by the Federal Deposit Insurance Corporation; all in violation of Title 18, U.S.C., §2113(a).

JOHN T. ELFVIN
United States Attorney

BY:

RICHARD J. ARCARA
First Assistant United States Attorney

A TRUE BILL:

David P. Dwyer
Foreman

1 PROCEEDINGS: February 21, 1974, 9:30 a.m.

2 APPEARANCES: As before noted.

3 (Defendant present.)

4 (Jury present.)

5

6 THE COURT:

7 Ladies and gentlemen, you have
8 heard the testimony in this case and at
9 this stage of the proceedings, you will
10 now listen to the summations of the
11 attorneys. The attorneys agree, without
12 question that your decision in this case
13 is to be decided by the testimony of the
14 witnesses, the evidence in the case and
15 the exhibits which have been admitted
16 into evidence.

17 However, certainly you are to
18 listen very carefully to the summations
19 of both Mr. Brown and Mr. Cohen. They
20 have carefully analyzed the case. They
21 have thought about it. They have had
22 experience in other cases and their
23 thoughts and suggestions are most import-
24 ant to your deliberation. Following
25 that I will charge you on the law which
applies in this case. As a help to you,

1 you should know that I will send to you
2 for your deliberation in the jury room
3 the indictment, so you will be able to
4 compare the facts in the case which the
5 charge placed here and all exhibits
6 admitted in evidence.

7 As I have already indicated to you,
8 there are some exhibits which have been
9 admitted in evidence which will not be
10 sent to you. For example, the medical
11 records, and frankly, none of us can
12 properly understand the medical records
13 unless we have the aid, the expertise of
14 the doctors, and we have heard the
15 doctor's testimony about part of the
16 records, so that part you will consider,
17 but the other portions will not be sent
18 to you.

19 You should not make up your mind
20 about anything you have read about this
21 particular incident outside of the
22 court or any incident similar to this.
23 You are not to be guided in your judgment
24 by some idea that something must be done
25 about these kinds of things. Each

1 incident must be judged on its own
2 merit. Remember that the burden is on
3 the Government to prove beyond a reason-
4 able doubt the guilt of the defendant.
5 It never shifts to the defendant.

6 MR. COHEN:

I would appreciate if you would
7 inform the jury about the stipulation
8 entered into between Mr. Brown and
9 myself concerning the records of the
10 Department of Mental Health.

11 THE COURT:

Exhibit 7, the Erie County Depart-
12 ment of Mental Health, they were records
13 kept in the regular course of business
14 of the Department and they were referred
15 to during the testimony of Dr. Miller
16 and I also believe Dr. Lynch as well.

17 MR. COHEN:

Just Dr. Miller.

18 THE COURT:

Just Dr. Miller. All right, Mr.
19 Brown.

20 MR. BROWN:

Good morning. Believe it or not,
21 we are at almost the end of this trial.
22 In a short time, Judge Curtin will in-
23 struct you on what the law of this case
24 is and thereafter, you will go down to
25 the jury deliberation room, bring with

1 you the recollection that you have of
2 what was testified to here, put that
3 together with the law as Judge Curtin
4 is going to instruct you on and at that
5 point, of course, then make your deli-
6 beration and finally reach a verdict.

7 At this point, however, I and Mr.
8 Cohen are each given an opportunity to
9 make a few brief comments called a
10 summation, comments on what the testi-
11 mony has been and perhaps some of the
12 inferences and some of the conclusions
13 that you might want to draw from what
14 you have heard.

15 Let me start by just saying this,
16 if I say anything about my recollection
17 of the testimony or my recollection of
18 the evidence which is different from the
19 way that you recall it, disregard what
20 I say on it and be guided, of course,
21 only by your own recollection, you
22 twelve, now fourteen people are here
23 and you heard the same things I did and
24 if what I heard or what I remember
25 hearing is different from what you

1 remember hearing, be guided by your own
2 memory..

3 Now, Judge Curtin, of course, has
4 already talked to you briefly about this
5 question of burden of proof, who has the
6 proof. At that table rests the burden
7 of proof. The Government must prove
8 beyond a reasonable doubt that Mr. Bell,
9 Thomas Bell or Jesse Thomas Bell was the
10 one who attempted to hold up this parti-
11 cular bank back in October and that all
12 of the other elements are there because
13 not only must the Government prove that
14 he, indeed, was the individual who was
15 in that bank, but they also must prove
16 the other elements including this thing
17 called intent. That is, a. intent to
18 do a particular act.

19 Now, this trial in length of time,
20 I suppose, has been a long one. Here we
21 are now at the end of the second week
22 but as far as the testimony is concerned,
23 however, I think you remember we first
24 met with you last Monday morning. We
25 took up most of the morning in selecting

1 twelve people from all the prospective
2 jurors who came in, and then in the
3 afternoon we heard a couple of hours of
4 testimony and we then came back on
5 Tuesday morning, upstairs I think it was,
6 and we heard from an FBI agent and we
7 heard from a Mr. Price from the Washington
8 Bureau on this, - not handwriting, but
9 fingerprint identification and then we
10 heard from Dr. Lynch and then we recessed
11 and came back, I think, last Wednesday
12 and we heard a little more from Dr.
13 Lynch and also from Dr. Miller.

14 The case has not been extensive as
15 far as the testimony that you have heard
16 but I think what it breaks down to are
17 basically two issues. First of all, was
18 the defendant, that individual who, on
19 October 11th, attempted to rob the bank
20 Now, Mr. Bell has entered a plea of
21 not guilty in this case. He denies being
22 guilty of that crime. The first issue
23 that you are going to have to talk about
24 and you are going to have to discuss and
25 you are going to have to reach a conclu-

1 sion on is whether the Government has
2 proven beyond a reasonable doubt that
3 this man, Mr. Bell, is the man who
4 actually did the things charged in the
5 indictment, but there is a second issue
6 also we spent a lot of time on, and
7 that second issue is this; assume, just
8 for the moment, assume that Mr. Bell was
9 the one, and we don't assume that, but
10 assume, just for a moment, for the sake
11 of argument, that he was the one that
12 went to that bank and did the things
13 that are set out in this thing called
14 the indictment. Even if he was, even
15 if Mr. Bell was the one who did it,
16 there is a second issue that you are
17 going to have to decide and that is this,
18 was the man mentally responsible,
19 criminal responsible for what he did on
20 that day. Those are the two issues in-
21 volved in this case. Those are the two
22 issues you have heard some evidence on.

23 Starting with the second issue first,
24 and I kind of hate to do it, because it
25 presupposes that Mr. Bell was the one

1 that did it and I don't want to pre-
2 suppose that, but assume that he was,
3 we heard from two separate psychiatrists
4 on the question of Mr. Bell's mental
5 capacity. That is, his ability to under-
6 stand what was wrong or his ability to
7 adhere or do what the law says he is
8 supposed to do. The question is not
9 what is mental state is now. The ques-
10 tion is not what his mental state was
11 last week or three months ago or five
12 years ago. The question is what was his
13 mental state on October 11, 1973, the
14 date charged in this indictment.

15 Now, you heard from Dr. Miller.
16 Dr. Miller was the Government psychiatrist
17 Dr. Miller was on the stand for some
18 period of time. The first thing, among
19 others, that Dr. Miller conceded was that
20 Thomas Bell does have a mental disease.
21 There is no issue in this case about
22 that. Dr. Miller conceded that he did
23 have a mental disease. The question is
24 whether that mental disease was of such
25 a nature that it substantially impaired

1 his ability to understand the wrongful-
2 ness of his conduct or to conform his
3 conduct to the requirements of law.

4 I am not even quite sure what
5 Dr. Miller said on that. He diagnosed
6 him as having, I think he said, a
7 psychopathic personality. When asked
8 to explain what a psychopathic person-
9 ality was, Dr. Miller said something to
10 the effect that it impairs the indivi-
11 dual's ability to conform his conduct
12 to the morals of the community. Now,
13 that sounds an awful lot like the standard
14 that Judge Curtin is going to tell you
15 about. That is what I recall from Dr.
16 Miller, but Dr. Miller said a few other
17 things also. He said that his diagnosis
18 was based on basically two things.

19 First, his interview with Thomas
20 Bell which was just about a week ago,
21 Thursday, the 14th of February. That
22 interview lasted one hour, about one
23 hour. The second source that Dr.
24 Miller used was the records from the
25 Buffalo State Hospital and from the

1 Meyer Hospital and also this last thing
2 from the County Mental Health Department.

3 Now, taking the interview first,
4 one hour at most, Dr. Miller saw Thomas
5 Bell. Dr. Miller did not conclude that
6 he was under any mental disease at that
7 time because Dr. Miller didn't recall
8 Mr. Bell saying anything about having
9 hallucinations and because Mr. Bell
10 didn't say anything about having hallu-
11 cinations, Dr. Miller didn't think that
12 the interview was a very productive one
13 one way or another, but what did Dr.
14 Miller know about the defendant at the
15 time that he is interviewing him for that
16 hour.

17 We have heard a lot of talk about
18 the use of drugs in treating mental
19 disease. We have heard Dr. Lynch ex-
20 plain to you why he thought it was im-
21 portant to at least look at what medica-
22 tion an individual was on at the time he
23 was being interviewed. Dr. Miller
24 didn't know what medication Mr. Bell
25 was on when he examined him on the 14th.

1 He started out by saying "Well, I recall
2 something about 50 milligrams of a
3 certain drug", and that came from the
4 records of the Erie County Holding Center.
5 I asked the doctor if he had examined
6 the records of the Erie County Holding
7 Center and he first said that he did.
8 He said that he examined those records
9 and then I asked him to show me where
10 they were and he couldn't find it, and
11 he then conceded that what he looked at
12 were these records from the Erie County
13 Mental Health Department. What turns
14 out to be a social worker's analysis of
15 what medication Mr. Bell was on, but on
16 when? The latest report from the social
17 worker in that file is January 29, 1973.
18 That is about six weeks before this
19 examination ever took place. All the
20 doctor would have had to do was call
21 Dr. Lynch. All Dr. Miller would have
22 had to do was call up the Erie County
23 Holding Center and maybe even go down
24 there and review the records. He didn't
25 do it. He did concede it was important

1 to determine what drugs an individual
2 was on during the time he was being
3 interviewed, but he didn't know what
4 drugs he was on, but the doctor said,
5 "Well, I did have all of these records
6 on Mr. Bell's past confinement in various
7 mental hospitals".

8 Mr. Cohen asked him "And did you
9 review the records", and the doctor said
10 "Yes, generally", and then there was some
11 exchange that went something like, "Do
12 you mean in detail, Doctor", and the
13 doctor said "Well, generally in detail",
14 or something like that.

15 Well, I asked Mr. Miller some
16 questions about some of the contents of
17 those records. Maybe it was unfair to
18 ask a doctor who, just a few days before,
19 claims to have reviewed in detail these
20 records, maybe it was unfair to ask him
21 some of those questions like "Is Thomas
22 Bell married or was he ever married",
23 The doctor said he thought he was
24 married. We know from Mr. Culver that
25 he was not married. There is no evidence

1 anywhere that Mr. Bell was married. He
2 simply was not. "What was his schooling,
3 Doctor", - "Well, I think he only went
4 to the 8th grade", says Dr. Miller.
5 Well, we know he had at least two years
6 at East High School. "What is the man's
7 family background, Dr. Miller", and he
8 didn't know what the man's family back-
9 ground was. "What was the diagnosis of
10 the Buffalo State Hospital in 1969".
11 He didn't know what the diagnosis was.
12 He had to look at the records again.
13 Maybe that was unfair of me to ask him,
14 but this is a doctor coming into court
15 who only a few days before claims to have
16 reviewed generally and in detail these
17 records. He didn't know a darn thing
18 about them. He didn't know anymore about
19 what was in those records when he was
20 on the stand than he did when he examined
21 Mr. Bell back on the 14th.

22 Now, you heard, however, from
23 another individual, Dr. Lynch. Dr.
24 Lynch went through some of his background
25 We know from Dr. Lynch that Mr. Bell

1 began, - at least there is a record
2 of mental treatment of Mr. Bell as far
3 back as 1966. Over eight years ago, he
4 started being treated for these mental
5 disorders and he was being treated
6 constantly until 1973. He knew before
7 this claimed bank robbery that he was
8 still being treated. Dr. Lynch told you
9 about schizophrenia, the mental disease.
10 He told you of the diagnosis of Dr.
11 Block of schizophrenia.

12 MR. COHEN:

I object, your Honor, There was
13 nothing in the record of any diagnosis
14 of schizophrenia from Dr. Block.

15 MR. BROWN:

Here are the records.

16 THE COURT:

Ladies and gentlemen, whatever the
17 lawyers' comments on the facts are, one
18 way or the other, it is interesting, but
19 it is your decision to make. I am sure
20 that Mr. Cohen or Mr. Brown would not,
21 in any way, make an attempt to misrepre-
22 sent, but whether they correctly state
23 it, it is for you to determine and you
24 are to make your judgment from the
25 testimony in the case.

1 MR. BROWN:

2 Now, what kind of diagnoses were
3 they. You recall Dr. Miller was talking
4 about a discharge diagnosis and then
5 there was a diagnosis that he said was
6 an admission diagnosis and somewhere
7 in between there were further diagnoses.
8 Now, Dr. Miller's reference to discharge
9 diagnoses was very interesting. If an
10 individual is confined in a mental
11 hospital and is then certified to be
12 discharged, what would you expect his
13 diagnosis to be on his date of discharge.
14 I hope you wouldn't expect it to be a
15 mental disorder like schizophrenia. He
16 wouldn't be discharged if he was still
17 under that condition. After a long
18 course of hospitalization and treatment
19 at the point of his discharge, he is
20 without mental disease and that is why
21 he is being discharged.

22 Dr. Miller also made some reference
23 to admission diagnosis. That is when
24 an individual is first admitted, they
25 make, based on information available,
before going through the course of

1 treatment, certain diagnoses. He said
2 that those weren't really reliable
3 either because those were made before
4 the hospital had a chance to see him.
5 I would like to point out, as Dr. Miller
6 has identified earlier, that certain
7 diagnosis by a Dr. Milano. No, Dr.
8 Milesky, you recall the testimony was
9 that Mr. Bell was admitted to the Buffalo
10 State Hospital in early May of 1969 and
11 he was kept there through some point in
12 late July when at that point he was
13 released. In between there, on July 11th,
14 there was a diagnosis made by Dr.
15 Milesky. Now, this is not a discharge
16 diagnosis and this is not a diagnosis
17 that was made at the beginning of his
18 hospitalization. This was a diagnosis
19 made after Mr. Bell had been confined
20 in a State mental hospital for a period
21 of at least two months. Dr. Milesky's
22 diagnosis at that time, July 11, '69 his
23 diagnosis, schizophrenia, chronic
24 undifferentiated.

25 Now, whatever Dr. Miller's thoughts

1 of discharge diagnosis and earlier ad-
2 mission diagnosis are, this is something
3 that is neither one of those. This is
4 something that was made after considered
5 course of treatment of an individual in
6 a mental hospital. Now, perhaps, and I
7 say "perhaps" you might want to consider
8 a couple of things as far as Dr. Lynch
9 is concerned. You might want to con-
10 sider during your deliberations the fact,
11 the fact that Dr. Lynch has seen Mr.
12 Bell since at least 1967. Perhaps Dr.
13 Lynch has a little more familiarity with
14 the case and with all of these records
15 than does Dr. Miller. Just perhaps you
16 might want to consider that. Perhaps
17 you might want to consider if you recall
18 some of the background of these two
19 doctors that Dr. Lynch is a little more
20 qualified, is a little more experienced

21 MR. COHEN:

I object, your Honor.

22 THE COURT:

Excuse me. I will overrule the
objection. That certainly is argument
and Mr. Brown is entitled to argue from
the facts in the case. Go ahead, Mr.

1 Brown.

2 MR. BROWN:

3 Perhaps you might want to consider
4 that Dr. Miller isn't even certified
5 by the American Board of Psychiatry.
6 Perhaps you might want to consider that
7 Dr. Lynch is certified, not just certi-
8 fied as a passing thing; something where
9 you have to take an exam, you have to
10 be experienced and then you are certified
11 by the American Board of Psychiatry.
12 Dr. Miller isn't even certified by them.
13 Perhaps you might want to consider that
14 Dr. Lynch is a little bit more familiar
15 with all of the background of this
16 case, which brings up the last point and
17 then I am going to leave this and say no
18 more about it. The most telling point
19 about Dr. Miller is the fact that the
20 doctor didn't even know that Thomas Bell
21 had been readmitted and retreated in the
22 Buffalo State Hospital in 1972. Dr.
23 Miller didn't even know that the diag-
24 nosis at that time from the records
25 reviewed by Dr. Lynch was again mental
disease of schizophrenia. Dr. Miller

1 wasn't even familiar with that. The
2 last record Dr. Miller looked at was
3 from the Buffalo State Hospital in
4 April of 1970.

5 I don't know how much more I can
6 say about that, but when we are talking
7 about burden of proof and we are talking
8 about reasonable doubt, I ask you to
9 take the testimony of Dr. Lynch. The
10 guy was sick, he has a mental disease,
11 and even though he is the guy charged
12 in the indictment, he simply is not
13 criminally or mentally responsible for
14 what he did, and the Government's attempt
15 to bring in Dr. Miller, - what can I
16 say; I leave that to you, but I would
17 like to get away from that because the
18 real key to this case is not psychiatry.
19 You only reach that point of doctors
20 and mental diseases and disorders if you
21 first believe that the Government has
22 proved beyond a reasonable doubt that
23 Thomas Bell was the one who went into
24 that bank on October 11th.

25 In that respect, you have basically

1 two things. You have the woman by the
2 name of Geraldine Schmid, the bank
3 teller, who says she was in the teller's
4 cage, a particular teller's cage, the
5 note cage on October 11th about quarter
6 to 4:00. Somebody came up to the cage
7 and handed her a note. She looked at
8 the note, she saw what it said and she
9 went back to a fellow named Bauer, the
10 assistant manager. Bauer, at that point,
11 called the police.

12 Mrs. Schmid has not seen Thomas
13 Bell since October 11, 1974. She came
14 into this courtroom and she sat in that
15 chair and she was finally asked the one
16 question which is probably the most
17 important "Do you see that individual
18 in the courtroom that you have just
19 described". Mrs. Schmid sat in that
20 chair and looked at Thomas Bell sitting
21 over there, whatever distance this is,
22 which perhaps may be important in a
23 minute, and said that she could not
24 identify him from there and she then
25 got off the stand and she walked over

1 here and had a little conversation with
2 Mr. Cohen. I don't know what was said,
3 and then said "Yes, that's him."

4 Well, Mr. Bell is required to be
5 in this courtroom. Perhaps the judge
6 will say a little more about that later.
7 Mr. Bell is sitting at a table next to
8 a lawyer that Mrs. Schmid knows is the
9 defense lawyer, at least in this case,
10 Mr. Bell. Who is she going to point to?
11 In addition to being the only black man
12 in the courtroom, he is the only indivi-
13 dual sitting next to his lawyer, but
14 there is another issue, another point
15 which you might want to answer. I asked
16 Mrs. Schmid how far away on October 11th
17 she was from the defendant, this indi-
18 vidual she says was in the bank and she
19 gave me varying distances and you recall
20 the average distance was something like,
21 she standing up there on the witness
22 stand, I asked her would it be this far
23 away and she said "No, a little closer.
24 About right here? Yes, about right
25 here", and this is the distance she says

1 she was on October 11th from the defend-
2 ant, from that witness stand to here and
3 she says she saw him at that point and
4 could recognize him and yet, she is
5 sitting almost the identical distance
6 in this courtroom four months later, from
7 here to there and she still can't identi-
8 fy him. She can't identify him in
9 court. She has to come off the stand
10 and walk over and look at him sitting
11 next to his defense lawyer at the de-
12 fense table and say "Yes, that's him".

13 Well, again, it is your determina-
14 tion. We have talked about reasonable
15 doubt and we have talked about burden
16 of proof. I would like to make just
17 a few additional comments and then say
18 no more, and among other things, this,
19 Mr. Bauer was the second witness who
20 testified. He was the assistant manager.
21 You will recall that he didn't recognize
22 the defendant. He really never saw his
23 face. he never made any identification
24 of the defendant. Mr. Bauer, I think,,
25 pointed out a couple of interesting

1 points. You will recall that Mrs.
2 Schmid left the window of her teller's
3 cage, went over to Bauer, showed him the
4 holdup note. Bauer calls the police.
5 At that point, this individual who had
6 handed the note to Mrs. Schmid walks out
7 of the bank. Mr. Bauer then goes to the
8 window. Mrs. Schmid is still back at
9 his desk. Bauer goes to the window and
10 sees somebody not walking away from the
11 bank, coming out of a doorway across
12 the street and up the street away, calls
13 Mrs. Schmid over and points that indivi-
14 dual out to Mrs. Schmid. That is when
15 Mrs. Schmid sees the defendant Thomas
16 Bell and then the police are called and
17 then Mr. Bauer points out to the police
18 who come just a few seconds after this
19 individual walked around the corner,
20 points out to the police the directions
21 in which he went and then the police go
22 out and they apprehend him, apprehend
23 him in the doorway of a bar. A bar is
24 where Mr. Bell is coming out of and he
25 is apprehended by the police and then
he is brought back to the bank and here

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1 is Mr. Bell, - the bank is closed at
2 this point and he is the only black man
3 in that bank and he is not standing alone.
4 He has one motorcycle policeman on his
5 left and he has one motorcyle policeman
6 on his right, and as they walk through
7 the doorway, he is pointed out to both
8 Mrs. Schmid and Mr. Bauer and Mrs.
9 Schmid says "Oh, yes, that's the man".
10 That is what man? That is the man Mr.
11 Bauer pointed out to you at the window
12 who is coming out of the doorway.

13 You talk about identification testi-
14 mony and you talk about witnesses coming
15 into a courtroom who have never seen
16 this individual before in their life and
17 tell you four months after the event
18 happened that this is the man who attempte
19 to hold them up. There is really very
20 little that I can say about identifica-
21 tion testimony that I think with a little
22 thought and some of your own experience
23 could probably be said a little better.
24 I submit to you that identification
25 testimony four months after the event

1 happened is probably the most unreliable
2 kind of evidence that you could ever
3 have. Take five people, let them watch
4 a scene out in the corridors here or
5 let them look at some people sitting in
6 the background and then bring those five
7 people back four months later to identify
8 our of six, eight people who were sitting
9 in the back here and who were standing
10 out in the hallway and I submit that you
11 probably are going to get out of those
12 five people three or four different
13 versions of what the guy looked like and
14 three or four different identifications.
15 That, though, represents the Government's
16 case on identification. The most
17 suspect type of testimony, I submit to
18 you, that you can ever have, but that is
19 all right, because the Government has
20 some large fancy photographs and this
21 is part of the Government's case and
22 what do these photographs do for you,
23 what aid are these photographs? I don't
24 know. Maybe we'll find some use for
25 them. Well, perhaps, they are a nice

1 set of pictures mounted on a nice large
2 frame to give you the impression that
3 this is a nice large case, but it is
4 going to take a little more than fancy
5 photographs to convict Mr. Bell, but
6 they have something else. They have the
7 man from Washington, D. C., Mr. Price.
8 Mr. Price comes into the courtroom and
9 he has some nice charts with him and he
10 also has a list of prepared questions,
11 suggested questions that Mr. Cohen should
12 ask him and when Mr. Cohen asks him the
13 questions, he comes out and gives the
14 answers, monotone answers like plugging
15 in a computer. He has been through this
16 many, many times. At least ten times
17 in the past year alone and he tells you
18 that the fingerprints he took off, and
19 you heard the number, Exhibit 2, are the
20 same fingerprints as the fingerprints of
21 Thomas Bell.

22 Well, that is nice. That is also
23 very impressive because we have here an
24 FBI man from the laboratory in Washington
25 telling you that Mr. Thomas Bell's

1 fingerprints are on this note. When
2 were they put on the note? Mr. Price
3 didn't know when they were put on the
4 note, but what he did know was very
5 interesting. He knew that there were
6 no other fingerprints on this note.
7 The only fingerprints that he could
8 identify, the only fingerprints - -

9 MR. COHEN:

I object, your Honor. That is an
improper summarization.

11 THE COURT:

No, it is not. It is argument,
Mr. Cohen. It is proper comment on the
facts in this case. Overruled.

14 MR. BROWN:

I think you will recall that Mr.
Price did say that the only fingerprints
that were capable of any identification
at all on this note were those of
Thomas Bell. I asked him "Did you find
any fingerprints from Agent Kruger".
You will recall he was the agent who
testified on the stand, - "No", and
then I asked "Any other fingerprints
of any other FBI agents". No finger-
prints of any of those people.

Lieutenant Fries over at the Police

1 Department, Buffalo Police Department.
2 No, no people had contact with the note.
3 "Did you find any fingerprints of anyone
4 in the Buffalo Police Department". We
5 know some of those people had contact
6 with the note. There were no finger-
7 prints of any of those people. "Did
8 you find any fingerprints from Mrs.
9 Geraldine Schmid"? Absolutely not, no
10 fingerprints of hers. "How about any-
11 body else employed by any bank Federally
12 insured"? No, the only fingerprints,
13 if Mr. Cohen thinks I am wrong, - there
14 is a transcript here you can have read
15 back, - the only fingerprints capable
16 of identifying were those of Mr. Bell.

17 Now, Mr. Bell, if you believe the
18 Government was the first person in a
19 long line of at least twelve to touch
20 that note. He was the first person to
21 touch it if you believe Mr. Cohen and
22 then after that all of these people
23 touched the note. All of the people
24 handled it. It is put into envelopes,
25 taken out of envelopes, transferred, and

1 why aren't there any other fingerprints
2 on that note and why are Mr. Bell's the
3 only fingerprints on the note? You
4 recall I asked Mr. Price a question about
5 what would happen if I put my finger-
6 print on that note and then someone
7 else came over and put their fingerprint
8 in the identical place on that note,
9 would it have any effect on your ability
10 to identify and he said yes, it may
11 very well, it may smudge it, it may do
12 something else with the self content
13 of a fingerprint. Any contention by the
14 Government that they have established
15 that Mr. Bell put his fingerprint on that
16 note at the time that it was handed
17 up to a teller in the course of an
18 attempted bank robbery is ridiculous.
19 There isn't one single piece of evidence
20 to establish when his fingerprint was
21 put on that note. Indeed, the evidence
22 is to the contrary, that the place
23 his fingerprint was put on that note
24 was when Mr. Bell was sitting over in
25 the Buffalo Police station from 4:30

1 until 6:00 o'clock, says Agent Kruger,
2 and at 4:30, Agent Kruger comes over.
3 He gets the note from Lieutenant Fries
4 who is sitting just outside of where
5 Mr. Bell is seated and he takes that note
6 and he goes over and he begins to inter-
7 view for an hour and a half, from 4:30
8 to 6:00, he is interviewing at a table
9 in the Buffalo Police Department, Thomas
10 Bell and during the course of that inter-
11 view, he didn't say handed, he said he
12 showed him the note and he looked at
13 the note. "Did Mr. Bell touch the
14 note", I asked that question, "When did
15 he put his fingerprints on it", and I
16 asked Agent Kruger "Did you have any
17 other special agent with you", and he
18 said "Yes, I had a fellow named", -
19 I don't know whether he said Alvarez or
20 something, but I asked "Did Agent
21 Alvarez touch this note at any time when
22 you are with Mr. Bell", and he answered
23 "I don't know, I don't remember". Of
24 course, he doesn't. During an hour and
25 a half talking about the custody of one

1 piece of paper Mr. Bell could have
2 touched that at any time. There has been
3 no evidence as to when his fingerprint
4 was put on, and more importantly, we
5 know that Mr. Bell was at the Buffalo
6 Police Department even before Agent
7 Kruger got there. We also know that
8 the holdup note was at the Buffalo Police
9 Department when Mr. Bell was there and
10 before Agent Kruger got there. What
11 testimony has there been as to the
12 access. What access did the defendant
13 have to that note while he was over there
14 in the Buffalo Police Department?
15 The Buffalo Police arrest him and they
16 take over the note and they go down
17 to the Buffalo Police Headquarters and
18 what contact did Mr. Bell have with the
19 note? Did one of those Buffalo
20 Policemen say "Here, did you write that
21 note, look at it". Bell picks it up
22 and looks at it and puts it down again
23 and says "No". I don't know. And most
24 importantly, you don't know because the
25 Government hasn't called one single

1 person to tell you what happened between
2 the time that Mr. Bell was arrested and
3 between the time that Agent Kruger got
4 to the Buffalo Police Department. We
5 have no idea. Fingerprints are nice.
6 Fingerprints are interesting. They
7 liven things up a little, I suppose, but
8 I tell you, in this case, they sure don't
9 prove a darn thing and they don't prove
10 that Mr. Bell attempted to hold up a
11 bank, but there is one other thing and
12 then I will sit down finally.

13 Mr. Kruger is testifying on the stan
14 Tuesday morning. He tells you all about
15 the holdup note. He tells you about
16 interviewing Mr. Bell. He tells you
17 that Mr. Bell denied having any involve-
18 ment in the attempted robbery. He also
19 tells us he asked Mr. Bell to give him
20 a few handwriting samples and Mr. Bell
21 does. He writes things out on a piece
22 of paper during this hour and a half
23 that Agent Kruger is with him. Agent
24 Kruger takes the handwriting examples
25 of Mr. Bell, that Mr. Bell gave him

freely and he takes this holdup note

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1 which has scribbled on it certain
2 writing and he puts those two documents,
3 this document, Exhibit 2, the holdup
4 note and those handwriting examples,
5 puts them in an envelope and sends them
6 off to Washington, D. C. to another
7 expert in another bureau of the FBI
8 and they do a comparison. They do an
9 analysis similar to the analysis they
10 did on the fingerprints and we know from
11 Agent Kruger that a report from the
12 laboratory in Washington comes back to
13 the FBI in Buffalo and we know that Mr.
14 Kruger has that report sitting in his
15 file downstairs, and where is it? You
16 talk about fingerprints and the one
17 thing that would establish the Government
18 case, the one thing is whether this hand-
19 writing is the handwriting of Thomas Bell
20 They did a comparison on it and where
21 is it. Where is that handwriting
22 analysis? They come in here with finger-
23 prints and they are all fine and dandy,
24 but the one thing that could acquit or
25 convict the accused is that handwriting

1 analysis and we haven't had it and I
2 submit to you it is reasonable and that
3 you may infer from the failure of the
4 Government to produce that, that that
5 would be adverse to their case and it
6 would be helpful, it would be exculpatory,
7 it would justify you acquitting the
8 defendant and I submit that is an in-
9 ference that I ask you to draw.

10 I have talked too long already and
11 I apologize, but this is important. You
12 people have sat here now for two weeks
13 and I appreciate it. Some of you have
14 been sitting here on your birthday, I
15 suppose, and that is maybe a little
16 aggravating too, but you people are
17 the only thing that stand between a
18 defendant and conviction for a serious
19 crime. I don't know how you can asso-
20 ciate with or how you can feel for some-
21 one like Mr. Bell. I don't know. I am
22 not in his position, but whether you
23 tend to feel for him or not, I wish you
24 would place yourselves in his position
25 or someone in your family in his position.

1 Assume that you or some member of your
2 family is accused in a Federal Court of
3 a Federal crime, What kind of people
4 would you want to have on your jury?
5 What kind of requirements would you put
6 on the Government to prove beyond a
7 reasonable doubt. Just consider what
8 the Government has done and what the
9 Government has failed to do and put your-
10 self in that position and I think if you
11 do that, there is only one verdict that
12 you can come to. The Government has
13 not proven this man's guilt beyond a
14 reasonable doubt and for that reason
15 alone, you should acquit him. You will
16 recall we talked earlier about this pre-
17 sumption of innocence, this wall that
18 surrounds a defendant when he comes in
19 to court and only when every stone on
20 that wall is torn down can you convict
21 him and I submit to you that wall is
22 the same today as it was when we started
23 this case over a week ago. I think that
24 is really all I have and I thank you
25 very much for your attention and I hope

you will do what is right.

1
2 THE COURT:

Mr. Cohen.

3 MR. COHEN:

May it please the Court, Mr. Brown,
ladies and gentlemen:

At the conclusion of my argument today, I will have finished my role as a lawyer in this case and I would like to thank you for the kind attention you have given the witnesses in this case, including the witnesses called by the defense because it is most important to the Government that you consider the evidence in this case, and all of it, not just some of it.

As you have been informed, the Government has the burden of proving the defendant's guilt beyond a reasonable doubt. For that reason, the Government opens and closes the case and what I will now try and do is put the evidence before you in some kind of perspective. I think it is important at this time to admonish you once more that nothing that Mr. Brown has said and nothing that I am going to say, nothing that Judge Curtin

1 will say is evidence in this case.
2 Therefore, as Mr. Brown stated to you,
3 if your recollection is different from
4 his or is different from mine, you
5 should rely on your recollection of
6 what the evidence was.

7 Now, in his opening statement, Mr.
8 Brown indicated that a brick wall stood
9 between the Government and the defendant
10 and the Government had to tear it down
11 before you could render a verdict of
12 guilty and that is what I am going to do.

13 The first brick in that wall is
14 also the first element of the offense
15 which I told you the Government had to
16 prove. It had to prove that on October
17 11, 1973, the deposits of the Marine
18 Midland Bank Western Main-Chippewa
19 Office were insured by the Federal
20 Deposit Insurance Corporation. You saw
21 Mr. Forness produce the certificate,
22 the certificate of insurance that was
23 in effect on that date and you even
24 see a picture of it hanging up in the
25 bank on a partition. You can look at

1 the exhibits carefully, and he did testi-
2 fy that that certificate was in effect
3 on October 11th.

4 The second element of the offense
5 was that the defendant Thomas Bell at-
6 tempted to take from Geraldine Schmid
7 money belonging to and in the care,
8 custody and control of the bank. Mrs.
9 Schmid, as you heard her, was a note
10 teller for Marine Midland Bank on October
11 11, 1973, and as such, she did have money
12 belonging to the bank in her care,
13 custody and control.

14 The defendant has raised a large
15 issue on the identification of Mr. Bell.
16 I submit to you that a careful scrutiny
17 of the evidence shows clearly that he
18 was clearly identified by all the people
19 involved in this case. Let's start with
20 Mrs. Schmid. She had the opportunity to
21 see him. What did she testify to? She
22 testified that she saw him first when he
23 was at her teller's cage. Now, did she
24 see him when he stepped up to hand in
25 the note. No, she didn't see him then.

1 She saw him first when he was in her
2 line and bothered one of her customers
3 for a cigarette and she saw him again
4 when Bell shoved her the note. Then
5 she went to the back of the bank and saw
6 him again from there. Then she went
7 back to the front of the bank and saw
8 him crossing the street, and how long
9 after that did she see him again in the
10 custody of police officers, - ten or
11 fifteen minutes, that's all, a very
12 short time. Is it likely within that
13 short a time she would forget an indivi-
14 dual whom she had had that much oppor-
15 tunity to see? She didn't forget. She
16 made that identification when that
17 individual was brought back into the
18 bank, and you can remember the testimony
19 that I read to you from Mrs. Witmer.
20 That testimony directly collaborated
21 Mrs. Schmid's. The general description
22 given by Mrs. Witmer matched the descrip-
23 tion given by Mrs. Schmid in just about
24 every detail. You remember particularly
25 the white turtleneck sweater, the plaid

1 slacks, the broad nose, and you recall
2 Officer Molinaro.

3 He testified that he selected Mr.
4 Bell from the description, and he parti-
5 cularly remembered, - he also mentioned
6 the turtleneck and the slacks and the
7 sport jacket also and the broad nose
8 once more.

9 Mr. Brown would have you believe
10 that the fingerprints have no bearing in
11 this case, the fingerprints that were
12 found on that note. I submit that that
13 is just not so. What happened, what is
14 the testimony? The testimony is this,
15 Mr. Kruger testified that when he went
16 to the bank he had to get that note from
17 Fries. He took it from Fries, the
18 lieutenant, and in order to show it to
19 Bell, had to take it from a locked,
20 sealed envelope and he testified he
21 showed it to Bell. Here is an experienced
22 man. He showed it to Bell and he did not
23 let Bell handle it. The only time
24 Bell's fingerprints could have gotten
25 on that note was when he put it there

1 when he was writing it.

2 I would like to go on to the third
3 element of the offense and that was that
4 the Government had to prove that Mr.
5 Bell attempted to take the money by
6 force and violence or by intimidation
7 and again, look at this note. He shoved
8 it at the teller and said "Give me all
9 your money or I will kill you". What
10 does she do? She got out of that and
11 she pushed the other teller out of the
12 bank. She told the other teller "Let's
13 get out of here before we get hurt", and
14 she went back and told Mr. Bauer.

15 Now, Mr. Brown has said "Where is
16 the handwriting, where is the handwriting".
17 We all know there is a report. Mr. Brown
18 knows there is a report. He has known
19 for quite a while and he would have you
20 believe that the absence of the hand-
21 writing expert could lead you to the
22 conclusion that the testimony would be
23 exculpatory of his client. Well, you
24 have heard two experts testify in this
25 case, Drs. Miller and Lynch and you know

1 that expert testimony doesn't always
2 agree. There is another very probable
3 explanation for the testimony of the
4 handwriting expert. Now, what are the
5 circumstances in which the sample was
6 obtained? A man is denying that he
7 attempted to rob a bank. He is denying
8 that he wrote a note. He is saying it
9 was his twin cousin. He is asked to give
10 handwriting samples. He knows, as well
11 as anyone else that if he gives the same
12 handwriting sample that was put on the
13 note that it can convict him so it is
14 quite possible that he would disguise
15 his handwriting and it is quite possible
16 that a handwriting expert could testify
17 from comparing those exemplars taken that
18 day that it just wasn't conclusive enough
19 in order for him to render his expert
20 opinion, and this leads us into the testi-
21 mony of the psychiatrists.

22 I could talk at great length about
23 the testimony of a psychiatrist. I feel
24 specifically that I should deal with the
25 criticisms leveled at Dr. Miller. The

1 first criticism is that he didn't have
2 records. Well, what are the records that
3 he had? He had the Meyer Memorial
4 Hospital records from 1966 to 1970. He
5 had the Buffalo State Hospital, - that is
6 the Meyer Memorial Hospital records from
7 '66 through '72. He had the Buffalo
8 State Hospital records from '66 through
9 '70. He had the benefit of Dr. Lynch's
10 reports from, as Dr. Lynch testified,
11 November and December of 1973. He had
12 the benefit of the Forensit Psychiatric
13 Service reports from December, '72 and
14 April, 1973 and October, 1973, and
15 November, '73 and January, '73.

16 Now, Dr. Lynch told you that you
17 have to interpolate to get at the man's
18 conduct on October 11, 1973, and that is
19 very important, and Dr. Miller had the
20 sworn testimony of witnesses to that
21 conduct. He had quite a bit to look at.
22 Now, Doctor, - excuse me, - the defense
23 makes quite a point of the fact that
24 Dr. Miller didn't have the records from
25 the hospitalization in 1972. Where were

1 they? We were all here. We all saw
2 Dr. Lynch go through them and we all
3 saw them or thought we saw them being
4 admitted into evidence, but when I asked
5 Dr. Lynch, on cross examination "Where
6 are these records", and showed him the
7 records of the Buffalo State Hospital
8 that had been admitted into evidence,
9 they weren't there. Now - -

10 MR. BROWN:

Your Honor, if the Government means
to imply that we have a burden of proving
something or producing something,
I strenuously object to it.

13 THE COURT:

14 Certainly, Mr. Cohen does not mean
15 to imply that because that is a correct
16 statement. There is no burden on the
17 part of the defendant to prove anything.
18 The burden remains on the part of the
19 Government, but it is simply a comment
20 on what may or may not be in evidence
21 and it is up to you to determine from
22 the testimony what the doctor relied
23 upon and what he used in his analysis.

24 MR. COHEN:

Now, in testifying with respect
to the 1969 admission Dr. Lynch relied

1 on the presumptive diagnosis of schizo-
2 phenia and he didn't tell us what the
3 discharge diagnosis in 1970 was which
4 Dr. Miller pointed out, without mental
5 disorder.

6 We don't know what the discharge
7 diagnosis from the 1972 hospitalization
8 of Mr. Bell was, but we do know that in
9 December of 1972, on two admissions to
10 the Meyer Memorial Hospital, he was
11 diagnosed as having a sociopathic
12 personality.

13 Well, I am discussing the records
14 from that 1969 admission. Dr., -
15 excuse me, - Mr. Brown pointed out Dr.
16 Milesky's diagnosis on July 11, 1969 of
17 schizophrenia, chronic undifferentiated
18 type and he also made a statement to
19 the effect that certainly if the man
20 had schizophrenia, he wouldn't let him
21 out of the hospital. Well, it just
22 happens that if he carefully read the
23 records, he would know that on July 7,
24 1969, Mr. Bell went home on a 4-day
25 visit and then on July 11, 1969, he was

1 released from the hospital on convale-
2 scent care and as the testimony pointed
3 out, he did have an appointment to come
4 back to the hospital in August of '69
5 and he had another appointment to come
6 back to the hospital in October of '69
7 which he didn't keep and the next record
8 of hospitalization if you look at the
9 records carefully occurs in November of
10 '69 at the Meyer, not even at the
11 Buffalo State Hospital.

12 I submit that insofar as any
13 criticism can be made with respect to
14 Dr. Miller having incomplete records, it
15 cannot affect his opinion in the case.

16 The second criticism leveled at
17 Dr. Miller was the fact that he only
18 saw Mr. Bell for an hour. What could he
19 learn in an hour, when did he see him?
20 He saw him February 14th. What have we
21 learned? We learned from Mr. Caver, his
22 counselor, and we learned from Dr. Lynch
23 that Mr. Bell responded favorably to
24 medicine and Dr. Miller knew he was on
25 medicine because Dr. Lynch himself reported

1 it and he had Dr. Lynch's report and so
2 he wasn't examining an individual and
3 he knew it at the time, at the period
4 close to the events in question. He
5 asked Mr. Bell about it and he got no
6 responsive answers concerning, - from
7 Mr. Bell about his conduct on the 11th.

8 If you can't find anything out
9 about what you want to know, there is no
10 use in pursuing it. He had other informa-
11 tion, as you all are aware. He knew what
12 was happening. He didn't need a lot of
13 interviews which he was going to get no
14 information.

15 That leads us directly into Dr.
16 Miller's conclusion. He concluded that
17 Mr. Bell did understand what he was doing
18 and he could have conformed his conduct
19 to the law and that he didn't need the
20 records of the 1972 illness after hearing
21 about it because he had reviewed all the
22 other matter and he was able to put it
23 in context and the question is is that
24 conclusion supported by the eight years
25 of history.

1 I am not going to detail each
2 admission and discharge diagnosis over
3 those eight years. Not only do you have
4 hospitalizations, you have emergency
5 room treatments, but the whole import
6 is sociopathic personality, sociopathic
7 personality and not schizophrenia. In
8 fact, if the records support anything,
9 they support that. They don't support
10 the conclusion of Dr. Lynch.

11 Did Dr. Lynch learn anything from
12 Mr. Bell? You remember that Dr. Lynch
13 stated that he couldn't remember what the
14 hallucinations were and you remember in
15 discussing paranoid schizophrenia, he
16 reported there were delusions, but Mr.
17 Bell had no delusions with respect to
18 believing that the bank or bank personnel
19 were persecuting him or that he no
20 delusions that the bank personnel were
21 out to do him harm.

22 Now, that corresponds very well with
23 the last question asked Dr. Lynch and
24 Dr. Miller's testimony. Dr. Lynch was
25 asked "Did Bell deny attempting to rob

1 the the bank", and Dr. Lynch said he
2 did, and what does that mean? That
3 means that Dr. Lynch's testimony goes
4 not just to the conduct in robbing the
5 bank; it goes to all of Bell's conduct
6 on that day, and what did Dr. Miller
7 tell us? Dr. Miller told us and the
8 records on Bell show it, that there are
9 schizophrenic paranoids operating in
10 this community every day and that they
11 can fulfill normal roles and just because
12 you have that diagnosis doesn't mean that
13 you don't know the nature of the wrong-
14 fulness of your conduct or that you
15 can't conform it to the standards of law.

16 As Dr. Miller pointed out to you,
17 it wasn't in his psychopathology to
18 commit a crime for personal gain. In
19 fact, he knows of no auditory hallucin-
20 ations in which the individual reported
21 hearing voices telling him to rob the
22 bank.

23 Now, I would like to conclude with
24 the last brick in the wall, and that
25 is willfulness and intent, and I am

1 going to ask you to do what Dr. Miller
2 did, and that is consider the conduct.
3 Where was he, where did the crime occur?
4 It occurred in a bank, a place which
5 people know there is money. What was
6 this crime? There was a note. It was
7 handed to a teller. An attempt was made
8 to get money. The individual observed
9 that he wasn't going to obtain any money.
10 He left the bank. He went down Chippewa
11 Street to a place where he could blend
12 in with the surroundings. He was
13 picked up shortly thereafter. He went
14 back. He was identified. He was taken
15 to the police station. He was inter-
16 viewed. He denied he was in the bank.
17 He denied that he wrote the note. He
18 said "It was my twin cousin". That is
19 all deliberate conduct from which you
20 can assume, infer intent, but there is
21 one more piece of conduct which shows
22 his intent. Between October 11th and
23 now, he changed his appearance.

24 Ladies and gentlemen, thank you.
25 for your attention. I am going to end

1 now and I submit not only has the
2 Government proven its case beyond a
3 reasonable doubt, but we have proven it
4 beyond all doubt.
5

6
7 * * * * *

CHARGE OF THE COURT

THE COURT:

Ladies and gentlemen, now that the summations have been concluded, it is my task to charge you on the law to the best of my ability. It is your job to accept the law as I charge it to you and to the best of your ability apply it to the facts which have been proven to your satisfaction in this case.

After I charge you, you will go to the jury room. At that time, it is a sensible arrangement to pick on of your number as a foreman, as a man who can sort of guide your deliberation and also when coming into court can report the verdict or can be an individual who, if there is any question to be asked of the Court can write out the question, give it to the marshal for delivery to the Court. You should not try to communicate with the Court in any other fashion except by a written communication given to the marshal. If you come into the court, do not let the Court know numeri-

1 cally how you stand until you have
2 reached a unanimous verdict.

3 It is important to remember that
4 your verdict in this case must be by a
5 unanimous verdict. That is, a verdict
6 of guilty must be by unanimous vote.

7 When we talk about deliberation,
8 what do we mean? We mean briefly that
9 when you go there to the jury room that
10 you listen to the well-reasoned comments
11 of your fellow jurors on the evidence
12 and how the evidence applies to the
13 law and then in turn that you also give
14 your well-reasoned, thoughtful comments
15 conscientiously thought out by you to
16 your fellow jurors. This case should
17 not be decided on bias or sympathy or
18 prejudice or some notion that something
19 has to be done about crime and so forth
20 and so on.

21 You can only make up your mind in
22 this case based upon the evidence before
23 you now and the law.

24 When you are deliberating, of course
25 if you find that you are mistaken after

1 you think about the comments of your
2 fellow jurors, then you should not
3 hesitate to change your mind. On the
4 other hand, after listening to their
5 comments you still think you were in the
6 right, you should, of course, if this is
7 your conscientious, reasoned course,
8 follow the dictates of what you believe
9 in. You should not give up your thoughts,
10 your reasoned thoughts for some petit
11 reason and, on the other hand, you should
12 not adhere to some idea that you have
13 for some petit reason or bias or preju-
14 dice.

15 The indictment will be given to you
16 and after you have reached a verdict,
17 you will come back into court and upon
18 questioning of Mr. White will orally
19 announce your verdict here in open court
20 and the verdict is either guilty or not
21 guilty.

22 In cases like this, some of you may
23 be familiar with state law or perhaps
24 through the medium of some television
25 show have heard a verdict like "not

1 guilty by reason of insanity" or "tempor-
2 ary insanity" or something like that.
3 We do not have a verdict like that in
4 this court. Perhaps there should be,
5 but there is not and therefore, we must
6 decide the case in accordance with the
7 rules before us. Your verdict can only
8 be guilty or not guilty. There is no
9 middle ground. If you felt after you
10 listened to all the evidence and con-
11 sidered the argument that your verdict
12 should be not guilty by reason of
13 insanity, that means that your verdict
14 is not guilty. It is up to the
15 Government to prove guilt of the defend-
16 ant beyond a reasonable doubt and if they
17 fail in any way, then your verdict must
18 be not guilty.

19 It is your job, as I have said be-
20 fore, to determine the facts and you do
21 that, essentially, from the testimony of
22 the witnesses. You also will do it from
23 the exhibits, those exhibits which will
24 be given to you in the jury room and as
25 I explained to you before, not all of

1 them will be delivered to you.

2 In determining the credibility of
3 the witnesses, you should carefully
4 scrutinize all the testimony given, the
5 the circumstances under which the
6 witness testified and every matter in
7 evidence which tends to indicate whether
8 the witness is worthy of belief. Con-
9 sider the witness's intelligence, motive,
10 state of mind and demeanor and manner
11 while on the stand. Consider also any
12 relation the witness may bear to either
13 side of the case, the manner in which the
14 witness might be affected by the verdict
15 and the extent to which, if at all each
16 witness is either supported or contra-
17 dicted by other evidence.

18 The mere fact that the testimony
19 of a witness is inconsistent or that
20 there are discrepancies in the testimony
21 does not necessarily mean that you must
22 reject the witness's credibility. You
23 must determine whether the inconsistency
24 or discrepancy is a result of falsifica-
25 tion or whether, on the other hand, is

1 the result of innocent miscalculation
2 or inaccurate observation.

3 In this case, we had some expert
4 witnesses testify or other witnesses
5 give opinion evidence. The rules of
6 evidence ordinarily do not permit wit-
7 nesses to testify as to opinions or
8 conclusions. An exception to this rule
9 exists as to those whom we call expert
10 witnesses and certainly, in this case,
11 both Dr. Lynch and Dr. Miller are expert
12 witnesses and also the fingerprint
13 expert called by the Government. Witness
14 who, by education or experience, have
15 become expert in some art, science,
16 profession or calling may state an opin-
17 ion as to relevant and material matter
18 in which they profess to be experts.
19 They may also state their reasons for
20 the opinion. You should consider each
21 expert opinion received in evidence in
22 this case and give it such weight as you
23 may think it deserves. If you should
24 decide that the opinion of an expert is
25 not based upon sufficient education and

1 experience, or if you should conclude
2 that the reasons given in support of the
3 opinion are not sound or that the opinion
4 is outweighed by other evidence, you may
5 disregard the opinion entirely, and
6 certainly, an expert's opinion is only
7 as good as the facts underlying, that
8 form the basis for his opinion, and if
9 you should determine that the expert is
10 mistaken as to facts upon which he
11 based his conclusion, then you should
12 disregard or discount his opinion to
13 that extent or to the extent which you
14 think is fair under the circumstances.

15 In this case, we also had testimony
16 concerning identification. On that
17 question, I instruct you that identifi-
18 cation testimony should be considered
19 with great caution and scrutinized with
20 great care.

21 In this case it is the custom in
22 our courts that the defendant must be
23 in court during the proceedings and
24 any identification made in the courtroom
25 must be viewed in that light. You are

1 instructed that evidence of identifica-
2 tion of the defendant in the absence of
3 prior familiarity with him is merely the
4 expression of an opinion of a witness
5 and is to be regarded as the jury in the
6 same light as any other opinion that may
7 be expressed by a witness.

8 In this case, you will recall that
9 the special agent of the FBI testified
10 that certain handwriting samples were
11 taken from the defendant and sent to the
12 FBI laboratory in Washington for compari-
13 son with the note used in the attempted
14 robbery which has been marked in evidence
15 as Government's Exhibit 2. You will
16 recall that the , - and it is up to you
17 to determine what the evidence is, but
18 my recollection is that a comparison
19 was sent down for a comparison and a
20 report was sent back to the local office.
21 You must keep in mind that if the
22 Government has, within its power, the
23 ability to call a witness who can give
24 material testimony on any issue in the
25 case, the Government's failure to call

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that witness may give rise to the inference that the testimony of the witness would be unfavorable to the Government.

You should keep in mind that in this regard, just as in any other regard, that the law does not impose upon a defendant in a criminal case, the duty or burden of calling any witness at all and so if there is going to be any favorable inference out of this particular thing, it must be to the favor of the defendant and against the Government.

I have told you that you are to consider only the evidence in the case, but in that consideration, you are not limited only to the bald statements of the witnesses. You are permitted to draw from facts which you find to have been proven such reasonable inferences as seem justified in the light of your own experience in life. An inference is a deduction which reason and common sense leads the jury to draw from facts which have been proven. Any inference which you draw from the evidence must

1 reasonably flow from the evidence and
2 must be based upon fact established by
3 the evidence.

4 There are two types of evidence
5 from which you may properly find a verdict
6 in the case. One is direct evidence.
7 That is, the evidence of a witness's
8 conduct and the other is circumstantial
9 evidence. Circumstantial evidence is
10 proof of a chain of circumstances point-
11 ing to the commission of an offense by
12 a defendant. From facts which you con-
13 sider to have been proven by direct
14 evidence, you may infer or deduce the
15 existence of other facts if you believe
16 the inference to be a reasonable one.
17 While you may properly draw an inference
18 from facts which you consider to have
19 been proven by direct evidence, you may
20 not base a further inference solely
21 upon the inference previously drawn. If
22 from the facts which have been proven,
23 you are susceptible of two inferences,
24 each of which appears to be reasonable,
25 one points to guilt and the other to

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innocence, it is your duty under the law
to adopt the inference which supports
innocence and reject that which points
to guilt.

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The law makes no distinction between
direct and circumstantial evidence, but
requires that before convicting a defend-
ant, you be convinced of his guilt beyond
a reasonable doubt.

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In this case, and I will send this
to you in the jury room, the defendant
Thomas Bell is charged in a one-count
indictment that on or about the 11th day
of October, 1973, he, by force and vio-
lence and by intimidation, did attempt
to take from the person and presence of
Geraldine Schmid, money in the care,
custody and so forth of the Marine Midland
Bank Western, the deposits of which were
then insured by the Federal Deposit
Insurance Corporation.

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I have said to you before, ladies
and gentlemen, it is most important for
you to keep in mind that an indictment
is absolutely no evidence of any crimina

1 conduct whatsoever. It is only a device
2 to tell the defendant what he is charged
3 with so that he may prepare his defense
4 and to make sure that he is not charged
5 again for the same or similar crime.

6 This Section 2113(a) in part pro-
7 vides as follows: "Whoever, by force
8 and violence or by intimidation takes or
9 attempts to take from the person or
10 presence of another any money belonging
11 to or in the care, custody, control,
12 management or possession of any bank,
13 shall be guilty of an offense against
14 the laws of the United States."

15 The term "bank" as used in this
16 section means any bank, the deposits of
17 which are insured by the Federal Deposit
18 Insurance Corporation. Before you can
19 find Thomas Bell guilty, you must be
20 satisfied of a number of essential
21 elements beyond a reasonable doubt before
22 you can find his guilt.

23 First, that the money taken or
24 attempted to be taken belonged to or was
25 in the care, custody, control, management

1 or possession of the bank whose deposits
2 were insured by the Federal Deposit
3 Insurance Corporation.

4 Secondly, that the act of attempting
5 to take such money from the person or
6 presence of another by force and violence,
7 the act of attempting to take the money
8 from the person or presence of another
9 by force and violence or by intimidation.

10 Thirdly, that such acts were done
11 willfully.

12 It is important that you keep in
13 mind that the act was done willfully.
14 That is, purposely, voluntarily, not
15 through any mistake. An act is done
16 willfully if done voluntarily and purpose-
17 ly and with the specific intent to do
18 that which the law forbids. That is to
19 say with that purpose either to disobey
20 or disregard the law.

21 I want to talk to you a few minutes
22 about specific intent, but before I do
23 that, I should explain to you that the
24 charge here in this case is for an
25 attempt to take money from the bank.

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"Attempt" is defined as an effort or an endeavor to accomplish a crime amounting to more than mere preparation or planning for it which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, did not bring to pass the party's ultimate design.

On the question of specific intent, you are charged that although intoxication or a stupor due to the use of drugs alone or due to the use of alcohol alone will never provide a legal excuse for the commission of a crime. The fact that a person may have been intoxicated or in a state of drug induced stupor at the time of the commission of the crime may negate the existence of specific intent to commit that crime. So, evidence that the defendant acted or failed to act while in the state of intoxication or while in stupor due to the use of some drug is to be considered in determining whether or not the defendant acted or failed to act with specific

1 intent as charged. If the evidence in
2 the case leaves the jury with a reason-
3 able doubt whether because of the degree
4 of his intoxication or drug induced
5 stupor the mind of the accused was
6 capable of forming or did form a
7 specific intent to commit the crime of
8 attempted bank robbery, the jury must
9 acquit the accused.

10 Again, you should bear in mind the
11 law never imposes upon a defendant in a
12 criminal case the burden or duty of
13 calling any witnesses or producing any
14 evidence. The burden of proof remains
15 upon the Government at all times.

16 Under the defendant's plea of not
17 guilty, there is an issue as to his
18 sanity at the time of the alleged offense.
19 The law does not hold a person criminally
20 accountable for his conduct while insane
21 since an insane person is not capable of
22 forming the intent essential to the com-
23 mission of a crime. A person is pre-
24 sumed sane. However, when that presump-
25 tion has been attacked or rebutted by

1 some evidence, then the burden is placed
2 upon the Government to prove beyond a
3 reasonable doubt that the defendant was
4 sane. A defendant is insane within the
5 meaning of these instructions if, at the
6 time of the alleged criminal conduct, as
7 a result of mental disease or defect, he
8 lacked substantial capacity either to
9 appreciate the wrongfulness of his
10 conduct or to conform his conduct to the
11 requirements of law. Under these instruc-
12 tions, substantial does not mean that
13 any capacity whatever is sufficient to
14 justify avoidance of criminal responsi-
15 bility, nor does it mean that you must
16 find that there was a total incapacity.

17 In these instructions "appreciate"
18 means more than mere intellectual
19 awareness that the conduct is wrongful.
20 It also includes an appreciation or
21 understanding of the moral or legal
22 import of the defendant's behavior at
23 the time of the act.

24 As used in these instructions, the
25 term "mental disease or defect" do not

1 include an abnormality manifested only
2 by repeated criminal or otherwise anti-
3 social conduct.

4 For the purpose of throwing light
5 upon mental condition of the accused at
6 the time of the alleged offense, you may
7 consider evidence of his mental state
8 both before and after that time. The
9 material issue, however, is whether the
10 defendant was sane or insane at the time
11 of the alleged criminal conduct.
12 Temporary insanity as well as insanity
13 of longer duration is recognized by the
14 law. If the evidence in the case leaves
15 you with a reasonable doubt as to whether
16 the defendant was sane at the time of
17 the alleged offense, you will find him
18 not guilty, even though it may appear
19 that he was sane at an earlier or at
20 later times. In considering the mental
21 state of the accused, the jury will
22 always bear in mind that the law never
23 imposes upon a defendant in a criminal
24 case the burden or duty of calling any
25 witnesses or producing any evidence.

As I have already explained to you, in a criminal case, a person is presumed to be sane, but when that presumption has been attacked or rebutted by some evidence sufficient to raise a doubt the defendant is suffering from a disease or a mental defect, the burden is then placed upon the Government to prove beyond a reasonable doubt that the defendant had the required mental capacity. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Substantial does not mean any incapacity is sufficient to justify avoidance of criminal responsibility nor does it mean that total incapacity is necessary.

"Appreciation" means more than intellectual awareness that conduct is wrongful. It includes an appreciation or understanding of the moral or legal

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import of behavior. The terms "mental disease or defect" do not include any abnormality manifested only by repeated criminal or otherwise anti-social conduct.

As you will see, I have repeated the instruction here because it is important, certainly, and I do not pretend that it is simple, but it is something that is for your consideration and that you must determine this from the evidence in the case.

A basic and an important rule in all criminal cases is that a defendant is presumed innocent until proven guilty beyond a reasonable doubt. That presumption of innocence remains with the defendant throughout the trial and continues to exist until such time as each juror is convinced beyond a reasonable doubt by legal and competent evidence that a defendant is guilty of the offense charged.

A reasonable doubt is a fair doubt based upon reason and common sense and

1 arising from the evidence. It is
2 rarely possible to prove anything to an
3 absolute certainty. A reasonable doubt
4 is not a vague, speculative or imagina-
5 tive doubt, but is such a doubt as would
6 cause prudent men to hesitate before
7 acting in matters of importance to them-
8 selves. A defendant is never to be
9 convicted on mere suspicion, conjecture
10 or surmise. Since the burden is upon
11 the prosecution to prove the accused
12 guilty beyond a reasonable doubt, a
13 defendant has a right to rely upon
14 failure of the prosecution to establish
15 such proof.

16 As we have said before, you should
17 make a judgment in this case based upon
18 all the evidence, all the cross examina-
19 tion and the exhibits which will be with
20 you.

21 In this case, the defendant did
22 not take the stand. It is important
23 that you keep in mind that he is not
24 required to. You may not draw any in-
25 ference whatever from the fact that the

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1 defendant did not take the stand. Indeed,
2 you may not consider it or comment on it
3 in any fashion during your deliberation.
4 That is a most important consideration
5 and one that I think you should certainly
6 keep carefully in mind and in no way
7 should you talk about the defendant's
8 failure to take the stand or consider it
9 in any fashion.

10 As I have told you before, your
11 verdict must be either guilty or not
12 guilty and if guilty, can only be by
13 unanimous vote.

14 I have already instructed you about
15 how to communicate with the Court and
16 about selecting one of your number as
17 the foreman.

18 Now I will ask you to step into the
19 corridor briefly so that I can listen to
20 the attorneys' further requests to
21 charge or exceptions to the charge given.

22 (Jury escorted from the courtroom.)

23
24 THE COURT:

25 Are there any requests to charge or
exceptions to the charge, Mr. Cohen?

1 MR. COHEN:

Your Honor, the Government make
an exception to the charge concerning
the not calling the handwriting expert.

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3
4 THE COURT:

All right.

5 MR. COHEN:

And, your Honor, the Government
would request that the Court charge the
jury in accordance with Paragraph 11 of
our proposed requests to charge.

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9 THE COURT:

Thank you, Mr. Cohen. I decline
to charge further. Mr. Brown.

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11 MR. BROWN:

No requests and no exceptions.

12 THE COURT:

Thank you. Have the jury step back
in, please.

13

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(Jury returns to the courtroom.)

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17 THE COURT:

All right. Would the marshal step
forward and be sworn, please.

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(One male and one female Deputy
United States Marshals sworn as
custodians of the jury.)

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24 THE COURT:

Mr. Volker and Mrs. Donovan, I
thank you for your careful consideration

25

1 but the law provides that we only have
2 twelve jurors and so you are excused
3 from further participation in this case.
4 You, Mr. Volker, have been in attendance
5 since November. We thank you for your
6 cooperation and you will be excused from
7 further jury service. Mrs. Donovan, it
8 is difficult to know when we may call
9 you back, but for the present, we will
10 leave you on the roll. The jurors may
11 walk out with the marshal to begin their
12 deliberation. We will be in recess.

13 (Jury retires at 11:07 a.m.)

14 (Recess taken pending deliberation
15 of the jury.)
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21 PROCEEDINGS:

February 21, 1974, 11:35 a.m.

22 APPEARANCES:

As before noted.

(Defendant present.)

(Jury present.)

1 THE COURT:

2 We are back in session in United
3 States against Thomas Bell, Criminal
4 1973-328. Mr. Bell is in the courtroom
5 with defense counsel, Government counsel,
6 and the jury is in the box.

7 Ladies and gentlemen, I have re-
8 ceived a request from you. Mr. White,
9 please mark this letter as a court
10 exhibit.

11 "Request - Judge Curtin, could we
12 have any medical records from 1972 on
13 in order to consider his (Mr. Bell)
14 mental state on October 11, 1973?"

15 Ladies and gentlemen, as I have
16 explained to you before, whatever
17 evidence, whatever exhibits are in evi-
18 dence, I believe, have been delivered
19 to you. As far as medical records are
20 concerned, they shall not be delivered
21 to you for a number of reasons. One
22 reason is that it takes an expert such
23 as Dr. Lynch or Dr. Miller to tell us
24 what they mean. Secondly, there is a
25 lot of material in there which is of
no concern of ours in making up our

1 minds in this case and under the rules,
2 I cannot deliver these records to you.
3 You have enough information before you
4 from the testimony of the witnesses in
5 this case to make up your mind.

6 The second question is "Could we
7 have a picture of Mr. Bell at the time
8 of his arrest (shortly after he was
9 at police station)?"

10 Whether or not there is a picture
11 such as that, I do not know, but whether
12 there is or there isn't, it shall not
13 be delivered to you. It is not in
14 evidence. It was not offered by either
15 side and we cannot pick it up now. Again,
16 you are to make up your mind based on
17 the evidence which is before you which
18 is, as far as the lawyers are concerned,
19 as far as the litigants in this case are
20 concerned, was sufficient for you to
21 determine the issue in this case. I
22 will now ask you to return to the jury
23 room and resume your deliberation.

24
25 (Jury retires at 11:38 a.m. to

1 resume its deliberation.)

2 (Recess taken at 11:38 a.m., pend-
3 ing the jury's deliberation.)

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8 PROCEEDINGS:

February 21, 1974, 3:10 p.m.

9 APPEARANCES:

As before noted.

10 (Defendant present.)

11 (Jury present.)

12
13 (Court Exhibits numbered 17, 18,
14 19, marked for identification.)

15
16 THE COURT:

The defendant is here. His counsel
and the Government lawyer, Mr. Cohen,
and members of the jury, I received a
note marked Court Exhibit 19. The first
question, "Judge Curtin, may we listen
to the evidence of the two women bank
tellers and the bank manager once again?

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22 Mr. Knisley has testimony of the
23 bank manager and one woman bank teller
24 which was, - they testified back on
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1 February 11th and we will read that and
2 we will take up the next lady teller
3 after we have the reading of these two
4 witnesses, so why not start, Mr. Knisley,
5 whenever you are ready.

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7 (Testimony of the witness Geraldine
8 M. Schmid read by the stenographer,
9 commencing at Page 25, Line 8, through
10 and including Page 54, Line 10.)

11
12 (Testimony of the witness Donald J.
13 Bauer was read by the stenographer,
14 beginning at Page 55, Line 1, through
15 and including Page 62, Line 21.)

16
17 MR. BROWN:

Excuse me, your Honor. I will read
18 the waiving of all of my cross examina-
19 tion if the Government will do the same,
20 unless the jury wants to hear it.

21 THE COURT:

Do you need the cross examination?

22 MR. COHEN:

Your Honor, I don't think we need
23 the cross examination of this witness.

24 THE COURT:

Mr. Foreman, does anyone feel they
25 need cross examination of this witness?

1 THE FOREMAN OF THE JURY: No.

2 THE COURT:

All right. Ladies and gentlemen,
the other witness, Mrs. Witmer, that was
read to you by Mr. Cohen, as you recall.
I believe that was on Tuesday of this
week, is that right, Mr. Brown?

7 MR. BROWN:

Wednesday, I believe, your Honor.

8 MR. COHEN:

No, your Honor, it was on Tuesday.

9 THE COURT:

Tuesday or Wednesday of this week.

At any rate, it seems to me there was a
good reason to hear the testimony of the
other witnesses, or there may be a good
reason because that was about ten days
ago, but in order for you to proceed
further, is it necessary for you to have
re-read the testimony of Mrs. Witmer,
and the reason I say that to you is that
your decision in this case should be
based upon all of the testimony and not
just excerpts from certain portions
and if that can be done without re-read
ing it, it ought to be done in that
fashion. Mr. Foreman, can you make
a judgment for the jury?

24 THE FOREMAN OF THE JURY: If possible, we would like to have
25

1 it re-read, if possible. From our point
2 of view in discussing the case so far,
3 we feel it is important.

4 THE COURT: I do not want you to tell me what
5 your discussion is.

6 THE FOREMAN OF THE JURY: Okay. We would like to have it
7 re-read or summarized.

8 THE COURT: I cannot summarize it. Is that
9 the consensus of all the jurors? Mr.
10 Brown, what is your position here?

11 MR. BROWN: It is sort of hard. If the jury
12 wants it, I am in a tough position to
13 say "no", but again, I have never been
14 able to cross examine this woman. She
15 has never been in court.

16 THE COURT: It seems to me that you have enough.
17 You have the other testimony. This was
18 just read to you two days ago. I was
19 reluctant since she was not here in
20 court to be cross examined in front of
21 you, I was reluctant to have it read in
22 the first place. I was convinced by
23 the authorities it should have been read
24 once, but in my discretion, I will not
25 read it again. You will just have to,

1 to the best of your ability, remember.

2 The other question, Number 2,
3 "Could we hear any written testimony of
4 Mr. Bell's medical record from 1972 to
5 approximately October 11, 1973?"

6 I have had a meeting with Mr. Cohen
7 and Mr. Brown on that and also a check
8 with Mr. Knisley about this. This infor-
9 mation is interspersed in a lot of
10 different testimony, partly treated when
11 Dr. Lynch testified; partly when Dr.
12 Miller testified and partly treated
13 during the testimony of the witness,
14 Mr. Caver.

15 It would be, number one, you cannot
16 separate this kind of testimony out from
17 all the other testimony in the case.
18 It does not mean anything unless you
19 consider it with all of the other, not
20 only the psychiatric testimony, but the
21 other testimony, so too much emphasis,
22 if we could mechanically pull out just
23 this testimony, it would not be, - it
24 would be unfair to one side or the other
25 in my judgment to read it and practically,

1 it would be just too great a burden and
2 would take too long, so again, your
3 judgment on this must be made upon all
4 of the testimony you have heard in the
5 case, psychiatric, the records and
6 everything else.

7 Now, we get to your third request
8 and that is "Could we also hear your
9 charge regarding the effect of alcohol
10 and/or drugs on the criminal act at the
11 time of the crime?"

12 I will read that to you with the
13 warning that again, you are to consider
14 the charge as a whole and not just a
15 couple of words out of the whole charge
16 and I think that perhaps what I might
17 do in this respect is to refer to how
18 you should handle the question of mental
19 capacity as a whole.

20 First of all, you will recall that
21 I set out certain elements which must
22 be proven beyond a reasonable doubt be-
23 fore you could vote a verdict of guilty
24 and I said to you that the act charged
25 must have been done willfully. An act

1 is done willfully if done voluntarily
2 and purposely and with a specific intent
3 to do that which the law forbids. That
4 is to say with that purpose to either
5 disobey or to disregard the law.

6 Then I said on the question of
7 specific intent you are further advised
8 that although intoxication or stupor due
9 to the use of alcohol or drugs alone
10 will never provide a legal excuse for
11 the commission of a crime. The fact
12 that a person may have been intoxicated
13 by alcohol or drugs or in a state of
14 drug - induced stupor or alcohol-induced
15 stupor at the time of the commission of
16 a crime may negate the existence of his
17 specific intent to commit that crime,
18 so evidence that a defendant acted or
19 failed to act while in a state of
20 intoxication or while in a stupor due
21 to the use of some drug or due to the
22 use of alcohol is to be considered in
23 determined whether or not the defendant
24 acted or failed to act with specific
25 intent as charged.

1 If the evidence in the case leaves
2 the jury with a reasonable doubt whether
3 because of the degree of his intoxication
4 or drug-induced stupor, the mind of the
5 accused was capable of forming or did
6 form the specific intent to commit the
7 crime of attempted bank robbery, the
8 jury must acquit the accused.

9 I told you that the law does not
10 hold a person criminally accountable for
11 his conduct while insane since an in-
12 sane person is not capable of forming
13 the essential element necessary for
14 the commission of a crime.

15 When, as in this case, there is
16 evidence has been presented as to the
17 insanity of a defendant at the time of
18 the commission of the crime, the burden
19 is placed on the Government to prove
20 beyond a reasonable doubt that the
21 defendant was sane at the time of the
22 commission of the offense. A defendant
23 is insane within the meaning of these
24 instructions if, at the time of the
25 alleged criminal conduct, as a result of

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mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Under these instructions, substantial does not mean any incapacity whatsoever is sufficient to justify avoidance of criminal responsibility, nor does it mean that you must find that there was a total incapacity.

Appreciate means more than mere intellectual awareness that conduct is wrongful. It also includes an appreciation or understanding of the moral or legal import of the defendant's behavior at the time of the act. The terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

For the purpose of throwing light upon the mental condition of the accused at the time of the alleged offense, the jury may consider evidence of his mental state both before and after that time.

1 The material issue, however, is whether
2 the defendant was sane or insane at the
3 time of the alleged criminal conduct.
4 Temporary insanity as well as insanity
5 of a longer duration is recognized by
6 the law. If the evidence in the case
7 leaves you with a reasonable doubt as
8 to whether the defendant was sane at the
9 time of the alleged offense, you will
10 find him not guilty, even though it may
11 appear that he was sane at earlier and
12 later times.

13 It would appear to me, ladies and
14 gentlemen, that you should be able to
15 continue with your deliberation.
16 Rather than have you run up and down
17 stairs, if there is any question in your
18 mind about whether you would be able to
19 continue with your deliberation, just
20 raise your hand and perhaps you can have
21 a conference on this floor before we
22 resume.

23 Everyone in agreement you can con-
24 tinue to deliberate? All right.
25 Please go back with the marshal and

1 continue your deliberation.

2
3 (Jury retires at 4:12 p.m. to
4 resume its deliberation.)

5
6 THE COURT:

Mr. Cohen and Mr. Brown, first of
7 all, do you have any comments or sugges-
8 tions or objections to the various pro-
9 cedures taken here?

10 MR. BROWN:

I have no objection to any of the
11 procedures you have just taken.

12 THE COURT:

Mr. Cohen, any suggestions you have?

13 MR. COHEN:

No, your Honor. I have no objec-
14 tion to this procedure.

15 THE COURT:

The jury is deliberating and we
16 hope they return a verdict soon. My
17 plan is this, that if they do not return
18 a verdict by 5:30, my plan is to have
19 them go to their homes overnight and then
20 come back tomorrow morning to continue
21 their deliberation and before they left,
22 I would give them instructions, certainly,
23 not to talk about the case, but really
24 to continue their deliberation when they
25 return. Any objection or any problem

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about that?

MR. BROWN:

I have none, your Honor, except I don't know what is going to be in the news this evening. No, I have none.

THE COURT:

I do not think there has been anything in the paper about this case. I do know that the reporters were here this morning and how greatly they will report it, I do not know.

MR. COHEN:

I think there might have been a small blurb back on October 12th that I picked up somewhere in the Buffalo Evening News. That is the only coverage I have seen.

THE COURT:

Mr. Cardinelli and Mr. Morgan were here this morning, but I will instruct them.

MR. BROWN:

I have no objection if they go home at 5:30 and then resume tomorrow morning.

THE COURT:

Fine. I would not plan for any dinner then. All right. We will be in recess.

(Recess taken at 4:14 p.m. pending the jury deliberation.)

1 PROCEEDINGS:

February 21, 1974, 5:20 p.m.

2 APPEARANCES:

As before noted.

3 (Defendant present.)

4 (Jury present.)

5
6 THE COURT:

The defendant is here, counsel
for the Government and defendant and
members of the jury.

7
8
9 Ladies and gentlemen, I have a note
10 here which shall be marked as a court
11 exhibit. It reads "We, the jury, do
12 not recollect if Thomas Bell had any
13 medical record after May of 1972."

14 Ladies and gentlemen, of course,
15 it is your recollection that is con-
16 trolling. Mr. Brown, Mr. Cohen and the
17 Court all have ideas about that, but it
18 is not our recollection which controls
19 here. It is yours.

20 "We do realize he had a previous
21 mental illness record before 1972. If
22 any medical records were introduced as
23 evidence after May of 1972, we would
24 like to hear testimony of such records
25 in order for us to determine his mental

1 state as of October 18, 1973."

2 That would require, ladies and
3 gentlemen, re-reading all of Dr. Lynch's
4 examination, all of Dr. Miller's testi-
5 mony and maybe the testimony of some
6 other witnesses which would really mean
7 that we would re-read practically all
8 the testimony of the trial. Frankly,
9 I do not think that is necessary. You
10 were all here. There were some adjourn-
11 ments in the trial of this case, but we
12 have criminal cases here that go on for
13 two or three weeks in which juries make
14 up their mind about testimony about the
15 case on testimony they have heard perhaps
16 three or four, and maybe a couple of
17 months before. It is a difficult task.
18 I do not say it is easy, but I absolutely
19 do not think that it is helpful to your
20 deliberation to have re-read all the
21 testimony in the case.

22 As to your function here, it is
23 not your function to be investigators.
24 It is your job to determine the issues,
25 the facts in the case from the evidence

1 which you recollect, which is important,
2 which is material, and to then apply
3 that to the law as I have charged it
4 to you.

5 It is important that you not vote
6 a verdict in this case in a sloppy
7 fashion. Your verdict should be con-
8 scientious, but frankly, we are all
9 human, we all make mistakes. No one
10 says there is such a thing as perfect
11 justice. Your function is this simply,
12 to take the indictment, take the charge,
13 take the facts as you recollect them,
14 collectively, to the best of your ability,
15 apply those facts to the law as I have
16 charged it to you and then vote a
17 verdict of guilty only if you are con-
18 vinced of defendant's guilt beyond a
19 reasonable doubt and if the Government,
20 in your opinion, does not come up to that
21 level, then you should acquit.

22 At this time, ladies and gentlemen,
23 it is twenty-five minutes after 5:00,
24 it seems to me that the best thing to
25 do is for you to stop your deliberation

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for today and return tomorrow at 9:30.
Would 9:30 be, - everyone can be here
at that time? Come back to the jury room
at 9:30. In the meantime, do not discuss
the case any further either among your-
selves or certainly, you do not talk
about it with any outsiders, no family
members, no friends, nobody that you
ride home with, even if you ride home
with a fellow juror. Talk about some-
thing else. Do not talk about the case.
Deliberation means that it should only
be carried on in the jury room in the
company of all of your fellow jurors.

The other thing is that I do not
know whether there will be any newspaper
account, radio or TV account about any
of the proceedings here, but if there
are, do not read any account, do not
listen to or do not watch any radio or
TV broadcast about this particular law-
suit, so at this time, we will be in
recess for the evening and gather together
you will gather together in the jury
room at 9:30 tomorrow morning for

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further deliberation. You may walk out.
Mr. Hofarth, you will lock the exhibits
in the jury room.

(Jury escorted from the courtroom.)

(Court Exhibit Number 20 marked for
identification.)

THE COURT:

We will be in recess for the
evening.

(Recess taken at 5:26 p.m.)

* * * * *

1 PROCEEDINGS: February 22, 1974, 11:10 a.m.
2 APPEARANCES: As before noted.
3 (Defendant present.)
4 (Jury present.)
5
6 THE COURT: Mr. White, call the jury roll,
7 please.
8 (Jury roll called, all present.)
9
10 THE CLERK OF THE COURT: Will the foreman kindly rise.
11 Members of the jury, have you agreed
12 upon your verdict?
13 THE FOREMAN OF THE JURY: Yes, we have.
14 THE CLERK: What is your verdict?
15 THE FOREMAN: We find the defendant Thomas Bell
16 guilty.
17 THE CLERK: Members of the jury, kindly listen
18 as the Court records your verdict. You
19 find the defendant Thomas Bell guilty
20 as charged in the indictment, so say
21 you all?
22 THE JURY: Yes.
23 THE COURT: Mr. White, poll the jury, please.
24 THE CLERK: Members of the jury, if this is
25 your verdict, kindly answer "yes" as your

1 (Jury polled, all replying in the
2 affirmative.)
3

4 THE COURT:

5 Ladies and gentlemen, thank you for
6 your very careful, conscientious and
7 earnest attention to the issues presented
8 to you in this case. Your thoughtfulness
9 certainly was expressed by the notes
10 you sent back to me and you clearly
11 indicated that you very carefully took
12 on the problems presented to you.

13 You are discharged from your duties
14 in this case. Any jurors who have been
15 serving from November or December will
16 not be called further during their
17 present term of jury service. We may, -
18 those of you called in January, we may
19 call you again, but we are not sure when.
20 Again, thank you. You may now walk out.
21 There are some things I must take up
22 with the attorneys. Any juror who has
23 any problem with pay, Mr. White will be
24 in the clerk's office in a few minutes.
25

(Jury escorted from the courtroom.)

1 THE COURT:

Mr. Bell is in jail. Could we
2 schedule sentencing on March 11, Monday,
3 at 10:00 a.m., Mr. Brown?

4 MR. BROWN:

Yes, your Honor.

5 THE COURT:

Any motions we can take on at that
6 time.

7 MR. BROWN:

At that time.

8 THE COURT:

If you want to make them at that
9 time, it will be fine. Mr. Brown, Mr.
10 White has some slips, if you would fill
11 them out prior to sentencing.

12 MR. BROWN:

I will.

13 THE COURT:

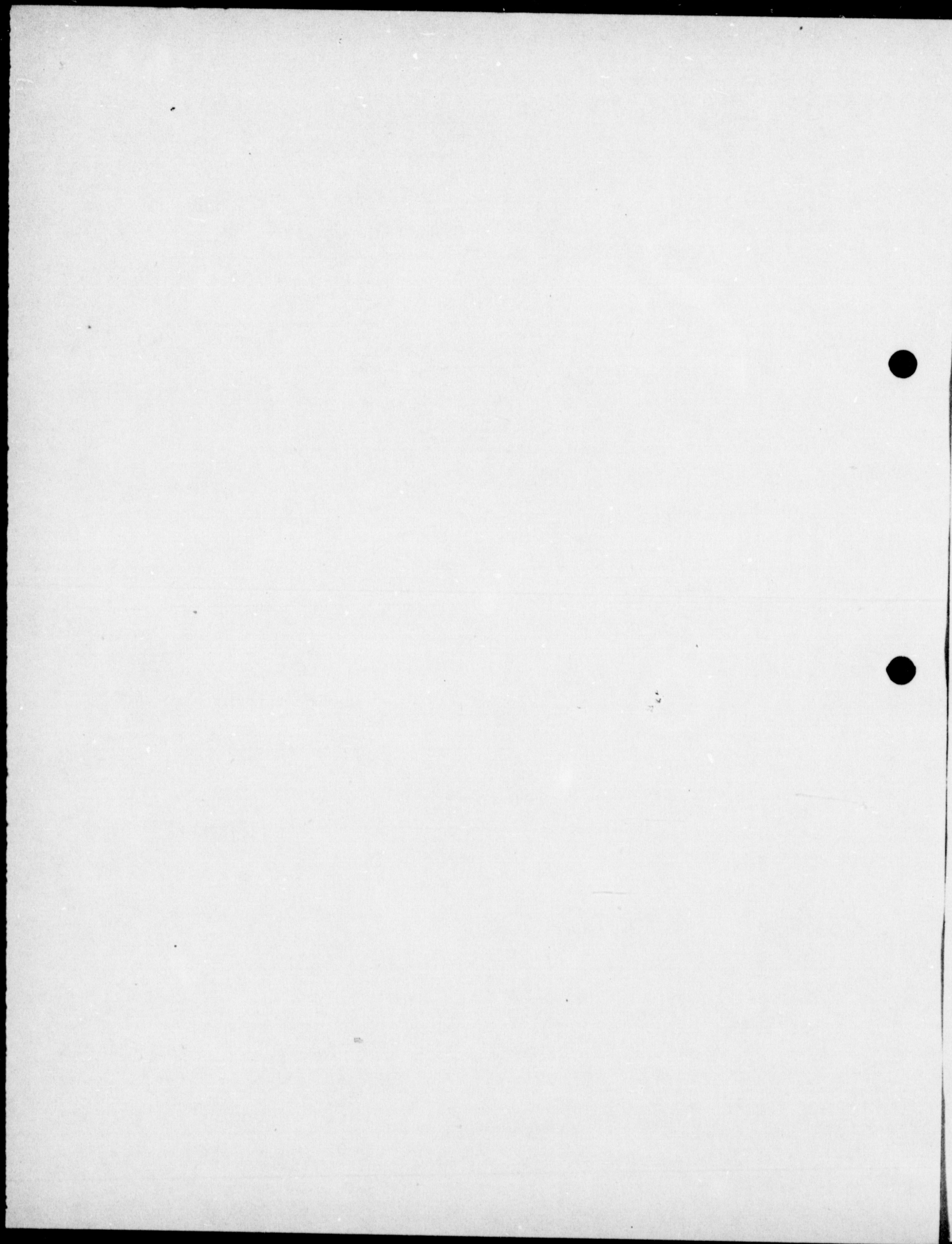
We want to ask you some questions
14 then about whether or not appeal will
15 be taken. Here are certain exhibits,
16 Defendant's Exhibit Number 1, the medical
17 and hospital records. If you have any
18 other, would you please get them back to
19 Mr. White immediately so we can deliver
20 them to the hospitals. Make sure they
21 get back.

22 MR. COHEN:

I don't have any of the hospital
23 records, your Honor.

24 THE COURT:

Were those copies from the Erie
25 County - -



1 MR. COHEN:

Yes, those were copies.

2 THE COURT:

Anything further Mr. Cohen or Mr.
3 Brown?

4 MR. BROWN:

I have nothing, your Honor.

5 THE COURT:

I want to thank you both for your
6 cooperation in scheduling during this
7 trial with all of the difficulties we
8 have had and I thank you very much. We
9 will be in recess.

10
11 (Trial proceedings herein concluded
12 at 11:15 a.m.)

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17 I hereby certify that the foregoing is
18 true and accurate to the best of my
19 stenographic knowledge.

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H. T. Noel
Official Reporter, U.S. District Court